Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–154–07 OF 2013 (Q), 05–155–07 OF 2013 (Q), 05–156–07 OF 2013 (Q) AND 05–159–07 OF 2013 (Q)

RAUS SHARIF PCA, AHMAD MAAROP, ZAINUN ALI, ABU SAMAH NORDIN AND RAMLY ALI FCJJ

26 SEPTEMBER 2016

Criminal Procedure — Appeal — Appeal against conviction and sentence — Common intention — First accused conspired with four others to inflict injury on deceased — Deceased robbed and killed — Whether prosecution proved case beyond reasonable doubt — Whether defence advanced by accused persons probable — Whether sufficient evidence to infer common intention among accused persons — Whether common intention established — Whether there was unity of purpose and meeting of minds — Whether injuries inflicted on deceased sufficient in ordinary course of nature to cause death — Penal Code ss 34 & 302

The first appellant ('the first accused') met PW1 to ask him to inflict injury on one Catherine Chong ('the deceased'). PW1 declined and instead introduced the first accused to the second appellant ('the second accused') who agreed to execute the plan. The first accused brought PW1 and the second accused to the deceased's house and told them to wait for his instruction. PW1 was later instructed by the second accused to rope in the fourth appellant ('the fourth accused'). PW1, the first, second and fourth accused had a discussion and after that, they headed to a pub as the first accused wanted to identify the deceased to the second accused. After identifying the deceased, all of them went to see the third appellant ('the third accused'), bringing him into the plot. The fourth accused and PW1 then met again and after the discussion, the first accused told the second, third, fourth accused and PW1 to go to the pub. The first accused did not go with them. PW1 saw the deceased coming out of a pub nearby. The first accused immediately left the scene. The second accused then pointed towards the deceased and asked the third and fourth accused to go after her. Five to six minutes later, the third and fourth accused came back to the place where PW1 and the second accused were waiting. According to PW1, the third and fourth accused each had a knife with them and there were blood stains on the knives. The fourth accused also had blood stains on his trousers. The second accused then made a phone call to the first accused and about half an hour later, the first accused turned up and handed over to the second accused RM1,600 which was later equally distributed between the second, third, fourth accused and PW1. Following an investigation, the four appellants were

caught by the police and charged at the High Court under s 302 of the Penal Code ('the Code') read with s 34 of the same Code in respect of the death the deceased. The post-mortem of the deceased showed numerous injuries to the head and neck and the stab wound to the right side of the neck was stated to be potentially fatal. At the close of the prosecution's case, the trial judge found that a prima facie case had been established against the accused persons and they were ordered to enter upon their defence. The first accused admitted giving instructions to the second accused to use his hands to scratch the deceased's face in order to frighten her and stop her from going out at night. His instruction to the second accused was not to use any weapon. He denied to have ever spoken to the third and fourth accused but only to the second accused. The second accused testified that PW1 introduced him to the first accused who wanted a certain lady to be inflicted with injury but not serious injury or which would result in death. The idea was to frighten her only. The specific instructions given by the first accused was to use the hand to scratch her face. The third accused denied receiving any instructions to injure the deceased. On the night of the incident, he simply followed the fourth accused after the deceased came out of the pub. When he came near the deceased she attacked both of them with her handbag and tried to stab him with a knife. He explained and demonstrated that the injuries to the deceased were self-inflicted as a result of the struggle with him and the fourth accused. The fourth accused testified that when the deceased entered her car, he opened the door and grabbed the deceased's handbag. A violent scuffle ensued with the deceased becoming the aggressor attacking him ferociously and angrily with a knife in one hand and a handbag in the other. The High Court judge found that the prosecution had proved its case beyond reasonable doubt and rejected the explanations advanced by the accused. The trial judge further found that the first accused was the one who orchestrated the whole episode and the rest of the accused were merely acting at his behest. The trial judge also found that there was sufficient evidence to infer common intention among all the four accused. According to the trial judge, there was a unity of purpose and there was certainly a meeting of the minds between the accused persons as to what was to be done and which was carried out by the third and fourth accused. The trial judge found that from the injuries inflicted on the deceased, the third and fourth accused must be taken to have had the intention of causing bodily injury to the deceased and did inflict these injuries on the deceased and the bodily injuries intended to be inflicted was sufficient in the ordinary course of nature to cause death. The accused persons appealed to the Court of Appeal but the appeal was dismissed. Hence, the present appeal.

Held, dismissing the appeals; affirming the convictions and sentences:

(1) The decision of the trial judge in convicting the accused persons on the charge of murder under s 302 read with s 34 of the Code was not wrong.

The convictions recorded against the accused persons were safe. The court considered the entire transaction, from the identification of the deceased's identity and location on the day of the incident to the actual infliction of fatal injury on the deceased's person, as the criminal acts in question, being the 'unity of criminal behavior' which resulted in the offence of murder (see para 85).

(2) All the accused to the criminal enterprise shared the intention to commit the criminal acts eventually perpetrated against the deceased even though only the third and fourth accused had physically perpetuated the offence itself. There was advance planning, entailing even a prior visit to and survey of the scene for familiarisation. On the fateful day, the victim was confronted in a situation where there were no bystanders. The events which occurred after the robbery created an indelible link between the accused persons. The events which unfolded after the incident clearly depicted that the accused persons knew that the deceased had been killed. It was without any doubt that the deceased was subjected to callous abuse and brutish violence before she met her death (see para 86).

(3) The first accused was the master planner of the whole crime. He hatched the plan to injure the deceased and went around scouting for others to carry out his plan. Undoubtedly, without his role of identifying the deceased to the other accused and without his payment no one would agree to his bid. He might not be at the scene of the crime or had not lifted a finger in the killing of the deceased but his exhortation and motivation for the commission of the crime must be seen to be part of the chain that led to the murder of the deceased. The first accused played a major role in planning the whole act. Participation by the first accused might be overt or covert and participation in need not in all cases be by physical presence (see paras 77 & 79).

(4) The role played by the second accused was no less significant. He recruited the third and the fourth accused and took them around to meet the first accused. It was the second accused who pointed the deceased to the third and fourth accused and asked them to go after the deceased, the moment the deceased was seen leaving the pub on that fateful night. While the third and fourth accused were pursuing the deceased, the second accused and PW1 waited at their motorcycles. Soon after, the second accused called the first accused and they met and he was given RM1,600 by the first accused which the second accused then distributed equally with the third and fourth accused and PW1. Clearly, the evidence suggested that the second accused facilitated the commission of the offence. The second accused's absence like the first accused from the actual scene of the crime was of little or no significance (see para 81).

(5) The third and fourth accused were armed with knives. This fact fairly supported an inference of complicity between the third and fourth

accused. The fact that both of them were pre-armed with knives left no doubt that the assault on the deceased was a premeditated one. Likewise, the multiple stab wounds inflicted on the unarmed and defenceless victim showed that the assault was nothing short of being cruel. The defence of violent fight or struggle was clearly not available to the third and fourth accused. It was highly unlikely that the deceased had behaved in a provocative manner as suggested by the third and fourth accused. Without a doubt the third and fourth accused were the actual perpetrators of the crime. It was inconceivable that the deceased was fighting with them with a knife in one hand and her handbag in the other. There was more than sufficient evidence that pointed to the culpability of the third and fourth accused (see paras 82–83).

(6) There was no doubt that PW1 was an accomplice. There was sufficient independent confirmation of the material particulars of PW1's testimony tending to connect all the accused to the offence. In respect of the first accused's involvement, PW1's account of the first accused's plan to hire several persons to cause injury to the deceased was well-supported by evidence which showed that the first accused had, shortly prior to the crime, made a first attempt to do so using the same modus operandi (see para 109).

[Bahasa Malaysia summary

Perayu pertama ('tertuduh pertama') telah berjumpa PW1 untuk memintanya mencederakan Catherine Chong ('si mati'). PW1 enggan dan sebaliknya memperkenalkan tertuduh pertama kepada perayu kedua ('tertuduh kedua') yang bersetuju untuk melaksanakan rancangan itu. Tertuduh pertama membawa PW1 dan tertuduh kedua ke rumah si mati dan memberitahu mereka untuk tunggu arahannya. PW1 kemudian diarahkan oleh tertuduh kedua untuk melibatkan perayu keempat ('tertuduh keempat'). PW1, tertuduh pertama, kedua dan keempat telah berbincang dan selepas itu, mereka menuju ke sebuah *pub* kerana tertuduh pertama ingin mengenal pasti si mati kepada tertuduh kedua. Selepas mengenal pasti si mati, mereka semua telah pergi berjumpa perayu ketiga ('tertuduh ketiga'), membawanya ke dalam komplot. Tertuduh keempat dan PW1 kemudian berjumpa lagi dan selepas berbincang, tertuduh pertama memberitahu tertuduh kedua, ketiga, keempat dan PW1 untuk pergi ke *pub* itu. Tertuduh pertama tidak pergi bersama mereka. PW1 melihat si mati keluar daripada *pub* berdekatan. Tertuduh pertama dengan segera meninggalkan tempat kejadian. Tertuduh kedua kemudian menuding ke arah si mati dan meminta tertuduh ketiga dan keempat untuk mengejarnya. Lima atau enam minit kemudian, tertuduh ketiga dan keempat datang semula ke tempat di mana PW1 dan tertuduh kedua sedang menunggu. Menurut PW1, tertuduh ketiga dan keempat masing-masing mempunyai pisau bersama mereka dan terdapat kesan darah pada pisau tersebut. Tertuduh keempat juga mempunyai kesan darah pada

seluarnya. Tertuduh kedua kemudian membuat panggilan telefon kepada tertuduh pertama dan lebih kurang setengah jam kemudian, tertuduh pertama datang dan menyerahkan kepada tertuduh kedua RM1,600 yang kemudian telah dibahagikan sama rata antara tertuduh kedua, ketiga, keempat dan PW1. Berikutan satu siasatan, keempat-empat perayu telah ditangkap oleh polis dan dituduh di Mahkamah Tinggi di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun sama berkaitan kematian si mati. Bedah siasat si mati menunjukkan pelbagai kecederaan di kepala dan leher dan luka tikaman di bahagian kanan leher dinyatakan yang boleh membawa maut. Di penutup kes pendakwaan, hakim perbicaraan mendapati bahawa kes prima facie telah dibuktikan terhadap orang yang dituduh dan mereka telah diperintahkan untuk memasuki pembelaan mereka. Tertuduh pertama mengaku telah memberikan arahan kepada tertuduh kedua untuk menggunakan tangannya bagi mencakar muka si mati bagi tujuan menakutkannya dan menahannya daripada keluar malam. Arahannya kepada tertuduh kedua adalah untuk tidak menggunakan apa-apa senjata. Dia menafikan telah bercakap langsung kepada tertuduh ketiga dan keempat tetapi hanya kepada tertuduh kedua. Tertuduh kedua telah memberi keterangan bahawa PW1 memperkenalkannya kepada tertuduh pertama yang ingin wanita tertentu untuk dicederakan tetapi bukan kecederaan serius atau yang menyebabkan kematian. Tujuannya adalah untuk menakutkannya sahaja. Arahan spesifik yang diberikan oleh tertuduh pertama adalah untuk menggunakan tangan untuk mencakar mukanya. Tertuduh ketiga menafikan telah menerima apa-apa arahan untuk mencederakan si mati. Pada malam kejadian, dia hanya mengikut tertuduh keempat selepas si mati keluar daripada *pub* itu. Apabila dia telah datang hampir dengan si mati dia menyerang kedua-duanya dengan beg tangannya dan cuba menikamnya dengan pisau. Dia menjelaskan dan menunjukkan bahawa kecederaan kepada si mati telah dilakukannya sendiri akibat pergelutan dengannya dan tertuduh keempat. Tertuduh keempat telah memberi keterangan bahawa apabila si mati masuk ke dalam keretanya, dia telah membuka pintu dan menyambar beg tangan si mati. Satu pergelutan secara ganas berlaku dengan si mati menjadikan penyerang menyerangnya dengan marah dengan pisau di satu tangan dan beg tangan di tangan satu lagi. Hakim Mahkamah Tinggi mendapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan menolak penjelasan yang dikemukakan oleh tertuduh. Hakim pebicaraan selanjutnya mendapati bahawa tertuduh pertama adalah seorang yang telah merancang keseluruhan episod itu dan selainnya tertuduh hanya bertindak atas arahannya. Hakim perbicaraan juga mendapati bahawa terdapat keterangan mencukupi untuk membuat kesimpulan terdapat niat bersama antara kesemua empat tertuduh. Menurut hakim perbicaraan, terdapat bersamaan tujuan dan sepastinya satu mesyuarat minda antara tertuduh-tertuduh berhubung apa yang dilakukan dan yang telah dilaksanakan oleh tertuduh ketiga dan keempat. Hakim perbicaraan mendapati bahawa kecederaan yang dialami oleh si mati,

tertuduh ketiga dan keempat perlu diambil kira mempunyai niat menyebabkan kecederaan badan kepada si mati dan telahpun melakukan kecederaan tersebut kepada si mati dan kecederaan badan yang diniatkan berlaku itu adalah mencukupi dalam perjalanan biasa untuk menyebabkan kematian. Tertuduh-tertuduh telah merayu kepada Mahkamah Rayuan tetapi rayuan ditolak. Justeru, rayuan ini.

Diputuskan, menolak rayuan-rayuan tersebut; mengesahkan sabitan dan hukuman:

(1) Keputusan hakim perbicaraan ketika mensabitkan tertuduh-tertuduh dengan pertuduhan membunuh di bawah s 302 dibaca dengan s 34 Kanun adalah tidak salah. Sabitan-sabitan direkodkan terhadap orang tertuduh adalah selamat. Mahkamah menganggap keseluruhan transaksi itu, daripada pengenalan identiti si mati dan lokasi pada hari kejadian sehingga hukuman sebenar kecederaan maut kepada orang yang si mati, sebagai perbuatan jenayah yang dipersoalkan, menjadi 'unity of criminal behaviour' yang mengakibatkan kesalahan membunuh (lihat perenggan 85).

(2) Semua tertuduh kepada perlakuan jenayah berkongsi niat bersama untuk melakukan perbuatan jenayah yang akhirnya dilakukan terhadap si mati walaupun hanya tertuduh ketiga dan keempat yang telah melakukan secara fizikal kesalahan itu sendiri. Terdapat perancangan terlebih dahulu, yang telah melibatkan walaupun lawatan sebelum itu dan kajian tempat kejadian untuk suai kenal. Pada hari yang malang itu, mangsa sedang berhadapan dalam situasi di mana tidak ada saksi. Peristiwa-peristiwa yang berlaku selepas rompakan itu mencipta pautan yang kekal antara orang yang tertuduh. Peristiwa-peristiwa yang berlaku selepas kejadian itu jelas menggambarkan bahawa tertuduh mengetahui bahawa si mati telah dibunuh. Ia adalah tanpa apa-apa keraguan bahawa si mati telah mengalami kekerasan tanpa perasaan dan keganasan tanpa akal sebelum dia menemui ajalnya (lihat perenggan 86).

(3) Tertuduh pertama adalah perancang utama keseluruhan jenayah. Dia telah mewujudkan rancangan untuk mencederakan si mati dan mencari orang lain untuk melaksanakan rancangan itu. Tidak dinafikan, tanpa peranannya untuk mengenal pasti si mati itu kepada tertuduh lain dan tanpa bayarannya tiada siapa akan bersetuju dengan tawarannya. Dia mungkin tidak berada di tempat kejadian jenayah atau tidak melakukan apapun dalam pembunuhan si mati tetapi dorongan dan motivasiya agar jenayah itu perlu dilihat sebagai sebahagian daripada rantaian yang membawa kepada pembunuhan si mati. Tertuduh pertama memainkan peranan utama dalam perancangan keseluruhan tindakan. Penglibatan

oleh tertuduh pertama mungkin menjadi terang-terangan atau rahsia dan penglibatan yang memerlukan tidak dalam semua kes dengan kehadiran fizikal (lihat perenggan 77 & 79).

(4) Peranan yang dimainkan oleh tertuduh kedua tidak kurang ketara. Dia merekrut tertuduh ketiga dan keempat dan membawa mereka berjumpa dengan tertuduh pertama. Ia adalah tertuduh kedua yang menunjukkan si mati kepada tertuduh ketiga dan keempat dan meminta mereka untuk mengikuti si mati, semasa si mati dilihat meninggalkan *pub* pada malam yang malang itu. Semasa tertuduh ketiga dan keempat mengikut si mati, tertuduh kedua dan PW1 menunggu dekat motosikal mereka. Tidak lama selepas itu, tertuduh kedua telah memanggil tertuduh pertama dan mereka bertemu dan dia telah diberikan RM1,600 oleh tertuduh pertama yang mana kemudian diagihkan sama rata oleh tertuduh kedua dengan tertuduh ketiga dan keempat dan PW1. Jelas sekali, bukti yang mencadangkan bahawa tertuduh kedua telah memudahkan pelakuan kesalahan itu. Ketidakhadiran tertuduh kedua seperti tertuduh pertama di tempat kejadian jenayah yang sebenar hanya sedikit atau tiada kepentingan langsung (lihat perenggan 81).

(5) Tertuduh ketiga dan keempat bersenjatakan pisau. Fakta ini telah menyokong kesimpulan terdapat sikap bersekongkol antara tertuduh ketiga dan keempat. Hakikat bahawa kedua-dua mereka tersedia bersenjatakan pisau tidak mewujudkan keraguan bahawa serangan ke atas si mati adalah satu yang dirancang. Begitu juga dengan kesan tikaman berganda dialami oleh mangsa yang tidak bersenjata dan tidak bersenjata menunjukkan bahawa serangan itu tidak lain daripada kejam. Pembelaan pergaduhan atau pergelutan yang ganas jelas tiada pada tertuduh ketiga dan keempat. Ia suatu yang sangat tidak mungkin bahawa si mati telah berkelakuan dengan cara yang provokatif seperti yang dicadangkan oleh tertuduh ketiga dan keempat. Tanpa ragu-ragu tertuduh ketiga dan keempat adalah pelaku jenayah yang sebenar. Ia adalah mustahil bahawa si mati telah bergaduh dengan mereka dengan pisau di satu tangan dan beg tangannya di tangan lain. Terdapat bukti mencukupi yang menunjukkan kebersalahan tertuduh ketiga dan keempat (lihat perenggan 82–83).

(6) Tiada keraguan bahawa PW1 adalah rakan subahat. Terdapat pengesahan berasingan yang mencukupi mengenai butir-butir material berhubung keterangan PW1 yang cenderung untuk mengaitkan semua tertuduh dengan kesalahan itu. Berhubung penglibatan tertuduh pertama, keterangan PW1 berhubung perancangan tertuduh pertama untuk mengupah beberapa orang untuk menyebabkan kecederaan kepada si mati telah disokong penuh oleh keterangan yang menunjukkan

bahawa tertuduh pertama telah, tidak lama sebelum jenayah itu, membuat percubaan pertama untuk berbuat demikian dengan menggunakan modus operandi yang sama (lihat perenggan 109).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Barendra Kumar v Emperor AIR 1925 PC 1, PC (refd)
Bashir v State AIR 1953 All 668, HC (refd)
Daniel Vijay s/o Katherasan and others v PP [2010] SGCA 33, CA (not folld)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Goh Wee Khian & Ors v PP and other appeals [2013] 6 MLJ 48; [2014] 1 MLRA 444, CA (refd)
Hari Ram v State of Uttar Pradesh [2004] 8 SCC 146, SC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643, FC (refd)
Low Kian Boon & Anor v PP [2010] 4 MLJ 425, FC (refd)
Mahbub Shah v Emperor AIR 1945 PC 118 (refd)
Manikumar Sinappan & Ors v PP [2015] MLJU 1956; [2016] 2 MLRA 1, FC (refd)
Muhammad bin Kadar and another v PP [2011] SGCA 32, CA (not folld)
(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Ong Chee Hoe & Anor v PP [1999] 4 SLR 688, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (folld)
PP v Teong Lung Chiong & Ors [2010] 5 MLJ 193, FC (refd)
Rex v Vincent Banka & Anor [1936] 1 MLJ 53, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Shaiful Edham bin Adam & Anor v PP [1999] 2 SLR 57, CA (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Evidence Act ss 8, 27, 114(b), 133
Penal Code ss 4, 34, 299, 300(c), 302
Penal Code [SG] ss 34, 300(c), 302, 394

Anthony Tai (Roger Chin with him) (Anthony Tai) for the first appellant in Criminal Appeal No 05–155–07 of 2013 (Q).
Hj Mohd Osman Ibrahim (Fadzillah Mohd Osman with him) (Osman Ibrahim & Co) for the second appellant in Criminal Appeal No 05–154–07 of 2013 (Q).

Yap Yau Sin (Wan Junaidi & Co) for the third appellant in Criminal Appeal No 05–159–07 of 2013 (Q).

Wit Malang (Wit & Co) for the fourth appellant in Criminal Appeal No 05–156–07 of 2013 (Q).

Hamdan bin Hamzah (Attorney General's Chambers) for the respondent in Criminal Appeal Nos 05–155–07 of 2013 (Q), 05–154–07 of 2013 (Q), 05–159–07 of 2013 (Q) and 05–156–07 of 2013 (Q).

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the four appellants against the decision of the Court of Appeal dated 13 May 2013, dismissing the appellants' appeal against conviction and sentence by the High Court.

[2] The four appellants were charged under s 302 of the Penal Code read with s 34 of the same Code in respect of the death of one Catherine Chong Jang Joon ('deceased'). The charge against the first, second and third appellants reads as follows:

> That you, together with two others still at large, on the 9th day of August, 2007, at about 1.30am at a spot at the Car Park of the Central Park Commercial Centre, in the District of Kuching, in the State of Sarawak, in furtherance of common intention of you all, committed murder by causing the death of CATHERINE CHONG JAN JUN (I/C No: 750812-13-5326) (F), 32 years old, and you thereby committed an offence punishable under Section 302 of the Penal Code read with Section 34 of the same Code.

[3] The fourth appellant was later charged separately. The charge reads as follows:

> That you, together with GOH WEE KHIAN (L), FAROSE BIN TAMURE MOHAMAD KHAN (L), ABDUL HADI BIN SABENI (L) and one still at large, on the 9th day of August, 2007, at about 1.30am at a spot at the Car Park of the Central Park Commercial Centre, in the District of Kuching, in the State of Sarawak, in furtherance of common intention of you all, committed murder by causing the death of CATHERINE CHONG JAN JUN (I/C No: 750812-13-5326) (F), 32 years old, and you thereby committed an offence punishable under Section 302 of the Penal Code read with Section 34 of the same Code.

[4] The cases were heard jointly by the High Court and the appellants were convicted and sentenced to death. The Court of Appeal dismissed their appeals and affirmed the decision of the High Court. Hence the present appeals.

[5] In this judgment, we will refer to the appellants as they were referred to in the High Court, namely Goh Wee Kian ('the first accused'), Farose Bin Tamure Mohamad Khan ('the second accused'), Abdul Hadi Bin Sarbeni ('the third accused') and Saidina Bin Sarbeni ('the fourth accused').

PROSECUTION'S CASE

[6] The prosecution's case is well narrated in the judgment of the Court of Appeal (see *Goh Wee Khian & Ors v PP and other appeals* [2013] 6 MLJ 48; [2014] 1 MLRA 444). Briefly, the facts are as follows. The deceased was the girlfriend of the first accused. Sometime in 2007 the first accused met one Sali Nimatullah bin Roslan ('PW1') to ask him to inflict injury on the deceased. PW1 declined, and instead introduced the first accused to the second accused. The first accused proposed the same plan to the second accused, who agreed to execute the plan.

[7] The first accused brought PW1 and the second accused to the deceased's house at Batu Kawa, where the first accused pointed out the deceased's house. From Batu Kawa all the three of them went to Semariang. There was a further discussion between the first and the second accused in the first accused's car. The details of the discussion were unknown to PW1. Before leaving, the first accused gave both the second accused and PW1 RM50 each and told them to wait for his telephone call.

[8] The next day, the second accused went over to PW1's house and told him that the first accused had called him and had cancelled the plan as there were others willing to do the job.

[9] A day later, the second accused met PW1 at Kampung Gersik and told him that the first accused had again requested them to do the job.

[10] Following this, PW1 was instructed by the second accused to rope in the fourth accused. PW1 went over to the fourth accused's house in Bintawa Hilir and told the fourth accused to meet the second accused at Kampung Gersik. Together with PW1, the fourth accused met the second accused at Kampung Gersik and they had a discussion.

[11] Later, the first accused arrived and the discussion continued between the first, second and the fourth accused. PW1 was not involved in the discussion.

[12] After the discussion, all of them went over to a pub at Ang Cheng Ho, Pandungan in the first accused's car. The first accused wanted to identify the deceased to the second accused. After identifying the deceased, all of them went

back to Kampung Bintawa Hilir. Here, the fourth accused went to see his younger brother, the third accused, bringing him into the plot.

[13] The fourth accused and PW1 then met again at Kampung Gersik where a further discussion took place. After the said discussion, the first accused told the second, third, fourth accused and PW1 to go to Ang Cheng Ho. The four went on motorcycles. The first accused did not go to Ang Cheng Ho with them.

[14] At Ang Cheng Ho, PW1, the second, third and fourth accused went to have drinks. Soon after, the second accused received a phone call from the first accused asking them to go over to Batu Tiga behind the Siang Siang Corner. They arrived there at about 12.30am It was on the 9 August 2007. The first accused was not there but arrived soon after. Upon the first accused's arrival, the second accused went into the first accused's car and some discussions took place between the two. Again, PW1 denied any knowledge about the subject matter of the discussion.

[15] Shortly after that, PW1 saw the deceased coming out of a pub nearby. The first accused immediately left the scene. The second accused then pointed towards the deceased and asked the third and fourth accused to go after her. PW1 saw the deceased going to the back of the building with the third and fourth accused following her. PW1 heard a woman's scream but did not see anything. His view was obstructed. Nearly five to six minutes later, the third and fourth accused came back to the place where PW1 and the second accused were waiting. The fourth accused was seen to have blood stains on his trousers. They then went to a place beneath the Bintawa Bridge. Upon arriving under the Bintawa Bridge, PW1 saw both the third and fourth accused each had a knife with them and there were blood stains on the knives. PW1 also saw a lady's handbag.

[16] The second accused then made a phone call to the first accused and about half an hour later, the first accused turned up and handed over to the second accused RM1,600 which was later equally distributed between the second, third, fourth accused and PW1. After that, all four of them left for their respective homes.

[17] The prosecution's case against all the accused persons is further supported by the evidence of a close friend of the deceased, Law Hung Ming ('PW2'). PW2 testified that she knew that the first accused was the deceased's boyfriend. PW2 went on to say that on 2 August 2007, about a week before the deceased died, the deceased confided in her that the first accused threatened to kill her by asking two to four persons to cut off her hands and legs and disfigure

her face and will drive away with her car and handbag to make it appear like a case of robbery. According to PW2, the deceased had also told her that early that morning she had been trailed by several persons, one of whom had introduced himself as 'Ah Boi'. A

[18] Another prosecution witness, Georgina Ting Nyi Chin ('PW9'), who was also a close friend of the deceased, testified that she knew the deceased's boyfriend by the name of Lucas Goh and on one occasion had overheard the deceased quarrelling with him over the phone over some matters relating to the advertising business of which they were erstwhile partners. PW9 also testified on the subject of the deceased telling her of being followed by several men. B C

[19] Norman bin Mahedin ('PW10') testified that the first accused wanted to pay him and his cousin 'Ah Boi' to disfigure the face of the deceased but they did not carry out what the first accused had asked them to do. D

[20] ASP Norsellehin bin Nor Hashim ('PW17') who was a senior investigation officer testified that on 9 August 2007 at 2.15am he received information relating to a murder at Mile 3, in the vicinity of Siang Siang Corner. When he arrived at the scene he saw the deceased lying on the ground. He casually examined the injuries on the deceased and there were four injuries to the neck and chest. The deceased was placed in a body bag and taken to the hospital and handed over to the attendant at the hospital mortuary. E

[21] PW17 further testified that the first accused was arrested on 9 August 2007 at his home at No 8 Lot 8663 Lorong 3A1, Beverly Heights, Kuching. F

[22] The second accused was arrested based the record of telephone calls made which was retrieved from the first accused's hand phone and the DIGI telecommunication records. After the second accused was arrested he divulged the identity of the other suspects. L/Kpl Abang Rili bin Abang Saalili ('PW16') was the arresting officer and testified that the second accused was arrested in front of MBF at Satok. The third accused was arrested in his House at Kampung Bintawa. PW16 testified that a blue nokia hand phone ('P44'), belonging to the deceased was confiscated during the third accused's arrest. It was near his bed side. The fourth accused was arrested on 5 September 2007. G H

[23] The post-mortem of the deceased was performed by Dr Norliza bt Ibrahim ('PW3'). PW3 testified that there were numerous injuries to the head and neck, the trunk and the arms of the deceased which included three stab wounds to the chest, a stab wound on the right side of the neck severing the right internal jugular vein and incisions to the right temple and left ear. PW3 further testified that the stab wound to the right side of the neck was stated to I

be potentially fatal because it severed the internal jugular vein which could lead to excessive bleeding and all the injuries could have been made by the same knife which appeared to be a single edge blade with a width of about 2cm. PW3 also testified that the stab wound to the neck was the cause of death. A post-mortem report was tendered as P4.

[24] At the close of the prosecution's case, the trial judge found that a prima facie case has been established against the accused persons on their respective charges. They were ordered to enter upon their defence.

THE ACCUSED PERSONS DEFENCES

[25] The accused persons elected to testify under oath.

[26] The first accused admitted giving instructions to the second accused to use his hands to scratch the deceased's face in order to frighten her and stop her from going out at night. His instruction to the second accused was not to use any weapon. He denied to have ever spoken to the third and fourth accused but only to the second accused. He was not at the scene of the crime as he had left about an hour earlier. But he admitted meeting all the three other accused beneath the Bintawa Bridge and giving them the money. The first accused also stated that he only knew about the death of the deceased some ten days later.

[27] The second accused testified that PW1 introduced him to the first accused. The first accused wanted a certain lady to be inflicted with injury but not serious injury or which would result in death. The idea was to frighten her only. The specific instructions given by the first accused was to use the hand to scratch her face. The first accused showed him where the deceased lived and brought him to a pub where the deceased happened to be in to identify the deceased to him. On the night of the incident, while he together with PW1, the third and fourth accused were having drinks, the first accused called him and asked them to go to Batu Tiga behind the Siang Siang Corner. The four of them went there and the first accused arrived soon after. The second accused then went inside the first accused's car to have a discussion while the other three, PW1, the third and fourth accused were outside. The second accused was told by the first accused that the deceased was inside a pub there. The first accused then left. The second accused then told the three of them that the deceased had just emerged from the pub and thereafter the third and fourth accused went after her while he and PW1 waited on a motorcycle. Not long after that he heard a woman's scream, and saw the third and fourth accused coming back to where he was waiting with PW1. Immediately thereafter, they left the scene and went to the Bintawa Bridge where he called the first accused who then came and gave him some money.

[28] The third accused denied receiving any instructions to injure the deceased. On the night of the incident, he simply followed the fourth accused after the deceased came out of the pub. When he came near the deceased she attacked both of them with her handbag and tried to stab him with a knife. He explained and demonstrated that the injuries to the deceased were self-inflicted as a result of the struggle with him and the fourth accused. The third accused further stated that the moment the fourth accused managed to grab the handbag from the deceased, the fourth accused ran away and he followed suit. They ran towards where PW1 and the second accused were waiting.

[29] The fourth accused testified that he arrived at the scene of the incident at 1am together with PW1, the second and third accused. About ten minutes later, the first accused arrived in a car and the second accused went inside the vehicle. After two to three minutes inside the car the second accused told him in the hearing of the third accused that the first accused had reminded the second accused that the injury to be inflicted on the deceased's face was to be carried out only with hand without using any weapon and to ensure that the deceased did not sustain any serious injury. The second accused also told him that the first accused said that the deceased might be in one of the pubs in the area. Soon thereafter, PW1 pointed towards the deceased, who was walking. At that point of time since he was not too sure about the identity of the deceased, he decided to change his mind about injuring the deceased's face but instead decided to rob her of her handbag. When the deceased entered her car, the fourth accused opened the door and grabbed the deceased's handbag. A violent scuffle ensued with the deceased becoming the aggressor attacking him ferociously and angrily with a knife in one hand and a handbag in the other. As a result of the struggle he sustained a cut on his thumb. The deceased was also screaming. The fourth accused further stated that the deceased also angrily attacked the third accused who then kicked the deceased's hand allowing him to grab the handbag and run back towards where the second accused and PW1 who were waiting.

DECISION OF THE HIGH COURT

[30] The trial judge found that the prosecution had proved its case beyond reasonable doubt. Having summarised the evidence, the trial judge rejected the explanations advanced by the accused as 'unbelievable because they defy common sense and are discordant with the common course of human affairs'. Further, the trial judge noted that the defences of all the accused' marked a 'departure from their initial stand in attacking the credibility of the testimony of PW1 as mere concoctions to save their own skin and thus denying having anything to do with the alleged offence'.

DECISION OF THE COURT OF APPEAL

[31] The trial judge found that the first accused was the one who orchestrated the whole episode and the rest of the accused were merely acting at his behest. The trial judge also found that there was sufficient evidence to infer common intention among all the four accused. There was overwhelming circumstantial evidence that the third and fourth accused caused the injuries to the deceased which led to her death. According to the trial judge, there was a unity of purpose and there was certainly a meeting of the minds between the accused persons as to what was to be done and which was carried out by the third and fourth accused. The trial judge found that from the injuries inflicted on the deceased, the third and fourth accused must be taken to have had the intention of causing bodily injury to the deceased and did inflict these injuries on the deceased and the bodily injuries intended to be inflicted was sufficient in the ordinary course of nature to cause death.

[32] The Court of Appeal dismissed the accused persons' appeals and upheld their respective convictions and sentences by the High Court. The Court of Appeal acknowledged that the High Court's judgment lacked a specific finding as to the common intention of the participants. This, according to the Court of Appeal, was a serious error but, despite that, the Court of Appeal found there was no miscarriage of justice. Applying s 60 of the Courts of Judicature Act 1964 the Court of Appeal scrutinised and re-evaluated the whole evidence and based on settled principle on the law on common intention, found that there was sufficient evidence to infer common intention among all the four accused. The Court of Appeal said so in the following words:

> There was in our view a unity of purpose and there was certainly a meeting of the minds between the four appellants as to what was to be done and which was carried out by the third and fourth appellants. They, (the first and second appellants) may have planned to injure the deceased but certainly it went too far. They must be held liable for the consequence and eventualities of their design. There was in our view common intention between them and although the first and second appellants never partake in the actual commission of the offence the full force of the law enshrined under section 34 of the Penal Code will afford no escape for them.

[33] In respect of the accused persons participation in the criminal act, the Court of Appeal gave little or no significance to the absence of the first and second accused at the scene of the crime, in light of the key roles played by them as the 'master planner of the whole crime' and the 'go between' respectively.

[34] In respect of the defence of the third and fourth accused, the Court of Appeal found the explanation given to be 'most preposterous' and an 'insult to one's intelligence'. The accounts of events given by the third and fourth accused

were rejected as 'mere concoctions to save their own skin'. The court further rejected the submissions on the uncorroborated evidence of PW1, who was an accomplice, noting that the trial judge had addressed the danger accordingly and agreeing with the finding that the evidence was in fact corroborated.

SUBMISSIONS

[35] Before us, as it was in the Court of Appeal, four different counsel appeared for the four accused persons. The first to submit was counsel for the first accused. He submitted that the first accused had no intention to kill the deceased. According to him, the intention on the part of the first accused was merely to cause injury to her face.

[36] Counsel for the first accused further submitted that a prima facie case had not been established as against the first accused. The failure of the trial judge to make a specific finding on common intention, it was submitted, had resulted in a misdirection occasioning a miscarriage of justice. And the Court of Appeal was wrong to uphold the conviction despite the misdirection in that there was sufficient evidence to infer common intention among the accused persons. In short, it was submitted that the Court of Appeal was wrong to resort to s 60 of the Courts of Judicature Act 1964, as there was a serious error on the part of the trial judge for not making a specific finding on common intention of the accused persons.

[37] Additionally, counsel submitted that the first accused's conduct did not fall within the ambit of s 34 because the first accused neither participated in the acts which caused injuries to the deceased, nor was he physically present at the scene of the crime.

[38] It was also contended by counsel for the first accused that the prosecution had failed to establish that the injuries inflicted upon the deceased were sufficient in the ordinary cause to cause death for the purposes of s 300(c) of the Penal Code. The expert evidence of PW3, the pathologist, was doubtful and in any event did not support such a finding; at best, the injury was only likely to cause death, thus falling under the ambit of s 299 instead.

[39] Learned counsel for the second accused adopted the submission by learned counsel for the first accused in particular on the issue of common intention. He submitted that the second accused, did not know, foresee or consent to the killing of the deceased with a knife. Counsel for the second accused further submitted that the chemist report ('P9') prepared by PW7, in respect of a DNA analysis was dubious and unreliable.

[40] Learned counsel for the second accused also raised the issue concerning the statement ('P56') and police report ('P57') by PW17, the investigating officer, containing statements made by the second accused. It was argued that the exhibits were wrongly admitted pursuant to s 27 of the Evidence Act 1950.

[41] Learned counsel for the third and fourth accused separately adopted the submissions by learned counsel for the first and second accused on the issue of common intention. In addition, they submitted that the Court of Appeal had failed to consider the defences raised by the third and fourth accused, namely that of a sudden fight and private defence respectively.

[42] In their submissions, learned counsel for all the accused persons had also separately highlighted the danger of accepting the uncorroborated evidence of PW1. According to them, PW1 was an accomplice in the incident who had accepted the offer by the police to give evidence on behalf of the prosecution in exchange for a discharge not amounting to an acquittal. Additionally, it was pointed out by counsel for the second accused and the third accused that PW1 played an important role in the commission of the offence and certain aspects of PW1's evidence were wholly unsupported by independent evidence.

[43] In response, the learned deputy public prosecutor ('deputy') submitted that the prosecution need not prove a common intention to commit the crime actually committed; thus, the finding that the accused persons shared a common intention to cause injury to the deceased was sufficient. Further, in light of modern advances in technology, physical presence was no longer required to constitute participation.

[44] The learned deputy further submitted that both the trial judge and the Court of Appeal rightly concluded that the injuries on the deceased were 'sufficient in the ordinary cause of nature to cause death' for the purposes of s 300(c), underlining that the said requirement is objectively assessed.

[45] In respect of the evidence, the learned deputy submitted that PW1 was not an accomplice but an accessory who played a minimal role in the crime; alternatively, that PW1's evidence was amply corroborated. It was also the learned deputy's submission that the evidences of PW1 and PW2, being independent evidences from different sources, were not conflicting but corroborative.

FINDINGS

Common intention

[46] The central issues in this appeal revolve around s 34 of the Penal Code which provides as follows:

> Each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[47] It is helpful to analyse s 34 in terms of these elements:

(a) a criminal act;

(b) participation in doing of the act;

(c) a common intention between the parties; and

(d) the act must be done in furtherance of the common intention.

[48] At this juncture, it is convenient first to address the generally accepted principles on the operation of s 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with.

[49] It is widely acknowledged that s 34 is a rule of evidence which embodies the common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (*Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643).

[50] If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v Emperor* AIR 1945 PC 118).

[51] The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (*Hari Ram v State of Uttar Pradesh* [2004] 8 SCC 146).

In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v State* AIR 1953 All 668).

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence (*Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 and *Manikumar Sinappan & Ors v Public Prosecutor* [2015] MLJU 1956; [2016] 2 MLRA 1.

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*). Such pre-planning may develop on the spot or in the course of commission of an offence, the crucial test being the plan must precede the commission of the offence (*(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336).

[54] A common intention may be often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232).

[55] As stated earlier, the above are the generally accepted principles on the operation of s 34. The main issue argued before us in the present appeals relates to the interpretation of the phrase 'in furtherance of the common intention of all' where the offence charged is not exactly the same as the offence commonly intended. It was submitted that there was no common intention of all the accused persons to murder the deceased. The common intention was only to inflict injury to the deceased. In this respect, we were invited to adopt the approach taken by the Singapore Court of Appeal (the apex court of Singapore) in *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] SGCA 33 and *Muhammad bin Kadar and another v Public Prosecutor* [2011] SGCA 32 with regard to the issue of common intention under s 34 of the Penal Code.

[56] As learned counsel relied heavily on the two cases by the Singapore Court of Appeal's analysis on s 34 of the Singapore Penal Code which is in pari materia with our Penal Code, it is only appropriate that the full facts of the cases be revealed. In *Daniel Vijay*, the facts are as follows:

> Sometime in May 2006, Ragu and Babu hatched a plan to carry out a robbery of expensive cargo to be transported by sterling from CAC for delivery to consignees. Babu recruited Bala to carry out the robbery. Bala then recruited Daniel and Christopher to assist him in carrying out the robbery. Sometime before the day of the robbery, Daniel took the baseball bat from a workshop at Changi where he had his car serviced. Several days before the robbery, Babu and Bala went to survey CAC.

They were driven there by Christopher. On the evening of 29 May 2006, Babu and the appellants met at a coffee shop at Block 125 Lorong 1 Toa Payoh to have some drinks. In the course of the evening, the robbery plan was discussed.

On 30 May 2006, at about 5.30 am, Ragu contacted Babu and informed him that sterling would be delivering the cargo, which consisted of 10 pallets of mobile phones (later found to contain 2,700 Sony Ericsson W700i mobile phones valued at about US$823,500), that morning from CAC to a consignee by lorry. Babu relayed the information to Bala, who was with Daniel and Christopher at that time. The appellants then proceeded to the vicinity of CAC in a rented ten-foot lorry bearing the registration number GM9520E ('lorry 9520'), taking with them the baseball bat. They subsequently met up with Babu, who told them that the lorry carrying the cargo bore the registration number YM815B ('lorry 815').

At about 7.00 am, the appellants saw lorry 815 being driven out of CAC (by Wan). Bala directed Daniel to follow lorry 815 in lorry 9520, while Babu, who was also at the scene, drove off separately in another lorry. Somewhere along Changi Coast Road, Daniel drove in front of lorry 815, causing Wan to stop it by the side of the road. After Wan alighted from lorry 815, he was assaulted by Bala repeatedly on the head and other parts of the body with the baseball bat, although he was not rendered unconscious. He was then carried into the cabin of lorry 815 and put on the floorboard in front of the passenger seat.

Daniel, together with Christopher, the drove lorry 815 to Pasir Ris Car Park A at Jalan Loyang Besar in the vicinity of Costa Sands Resort ('Car Park A'). Bala followed in lorry 9520. After arriving at Car Park A, Daniel and Bala transferred two pallets of the cargo (comprising 540 mobile phones) from lorry 815 to lorry 9520. Bala then instructed Christopher to drive lorry 9520 with the two pallets on board to Daniel's rented apartment in Ang Mo Kio ('the Ang Mo Kio Apartment'). Shortly after, Babu arrived at Car Park A to join Daniel and Bala, who transferred the remaining eight pallets of the cargo (comprising 2,160 mobile phones) from lorry 815 to Babu's lorry. Babu then left Car Park A with Daniel and Bala, while lorry 815 (with Wan in it) was left at the car park. Later, Daniel and Bala met up Christopher, and they transferred the two pallets of the cargo from lorry 9520 to the Ang Mo Kio Apartment.

At about 8.52 am that same day, a member of the public reported to the police that he found a man covered in blood in a lorry. The police went to investigate and found Wan sitting in the from passenger seat of lorry 815. Wan managed to alight from the lorry on his own when the police opened the door of the passenger compartment. He was sent to Changi General Hospital, where he underwent emergency surgery on his head. He died without regaining consciousness on 5 June 2006, about five days after the robbery. The autopsy disclosed that at least 15 blows had been inflicted on Wan on the head and other parts of his body.

Police investigations subsequently led to the arrest of Bala, Ragu and Babu while Daniel and Christopher surrendered themselves to the police.

Ragu was charged with one count of abetment (by conspiracy) of robbery, punishable under s 109 read with s 392 of the Penal Code. He pleaded guilty and was sentenced by the District Court to six years' of imprisonment and 12 strokes of

the cane. The sentence was reduced to four years and six months' imprisonment and six strokes of the cane on appeal to the High Court.

Babu was charged with:

(a) One count of abetment (by conspiracy) of armed robbery with hurt, punishable under s 109 read with ss 394 and 397 of the Penal Code;

(b) Two counts of voluntarily assisting in the concealing and/or disposing of stolen property in furtherance of a common intention, punishable under s 414 of the Penal Code read with s 34; and

(c) One count of abetment (by conspiracy) of voluntarily assisting in the concealing of stolen property, punishable under s 109 read with s 414 of the Penal Code.

He pleaded guilty to all the charges and was sentenced by the High Court to a total of 16 years and six months' imprisonment and 24 strokes of the cane. He did not appeal against the sentence.

Bala, Daniel and Christopher were charged with the murder of Wan committed in furtherance of common intention, pursuant to section 302 read with section 34 of the Penal Code.

[57] Before the High Court, the trial judge held that on evidence, Bala had satisfied the requirements for liability for the offence of murder as set out in s 300(c) of the Penal Code, which requires, inter alia, the infliction of the injury that 'is sufficient in the ordinary course of nature to cause death'. Bala was convicted and sentenced to death.

[58] As for Daniel and Christopher, the trial judge also convicted them for murder, pursuant to s 34 of the Penal Code. In his grounds of judgment, the trial judge did not find that the three accused persons had a common intention to cause Wan's death, or to knock him unconscious, or to inflict any specific injury on him. Their common intention was to commit robbery. He also did not find that Daniel and Christopher had participated in the assault. He did, however, find that Daniel and Christopher knew the violence would be necessary in order to facilitate the commission of robbery, and the assault on Wan was in furtherance of the common intention to rob him. Thus, the trial judge held that this satisfied the additional mental element required to render them liable for the criminal act of Bala pursuant to s 34 of the Penal Code.

[59] On appeal, the Singapore Court of Appeal held that Bala was properly convicted under s 300(c) for murder as he had intentionally inflicted on Wan, using the baseball bat, injuries that was sufficient in the ordinary cause of nature to cause death, which caused the death of Wan. However, in so far as Daniel and Christopher were concerned their conviction for murder was set-aside. In substitution they were convicted of the offence of robbery with

hurt under s 394 read with s 34 of the Penal Code.

[60] The Singapore Court of Appeal speaking through the judgment of Chan Sek Keong CJ held that having regard to the fact that the trial judge did not find Daniel and Christopher had a common intention (with Bala) to cause death or injury to Wan or that Daniel and Christopher had participated in causing injury to Wan, it could not be accepted that Bala's assault on Wan was done in furtherance of common intention. Further, the presence of knowledge that violence would be used or that Wan would be assaulted would be insufficient to justify the conclusion that there was a common intention amongst the three of them to use violence against Wan.

[61] The important pronouncement made by Chan Sek Keong CJ in *Daniel Vijay* was that for an offence under s 300(c) of the Penal Code, if s 34 of the Penal Code were to apply, it would not be sufficient for the secondary offender to have subjective knowledge that some form of hurt might likely be caused to the victim. The secondary offender must have subjective knowledge of the likelihood of the victim receiving, specifically, s 300(c) injury. It was held that the evidence did not establish beyond reasonable doubt that Daniel and Christopher subjectively knew that Bala might likely inflict s 300(c) injury to Wan in furtherance of their common intention to commit robbery.

[62] The decision in *Daniel Vijay* was followed in *Muhammad bin Kadar and another v Public Prosecutor*. In that case, Muhamad and Ismail who are brothers were charged under s 302 read with s 34 of the Penal Code and both were convicted by the High Court. On appeal to the Singapore Court of Appeal, the finding of the trial judge that the deceased was killed in furtherance of a common intention to commit robbery under s 302 of the Penal Code read with s 34 of the Penal Code was substituted with conviction for murder under s 302 in respect of Muhammad, while Ismail, the appeal was allowed and conviction set aside.

[63] Following *Daniel Vijay*, the Singapore Court of Appeal in *Muhammad bin Kadar* held that for a joint liability under the doctrine of common intention as set out in s 34, the common intention of all the offenders must include an intention to commit the very criminal act done by the actual doer which resulted to the offence charged.

[64] The above two decisions of the Singapore Court of Appeal, were extensively discussed by our Court of Appeal. In conclusion, the Court of Appeal held:

> [61] We have carefully read the two Singapore Court of Appeal authorities cited by the learned counsel for the 1st Appellant. We note that the Singapore Court of

Appeal was restating the law on constructive liability under section 34 of the Penal Code.

[62] In Daniel Vijay's case, the Singapore Court of Appeal was seeking to realign the legislative policy on gang robbery with murder and on murder in a non-gang robbery scenario as well as the legislative policy on the imposition of constructive liability on secondary offenders under s 34 of the Penal Code. This is evident from the concluding paragraph of the judgment which states:

> In short, if the putative Mimi Wong (CCA) test were good law, there would be a misalignment between, on the one hand, the legislative policy on gang-robbery with murder and, on the other hand, the legislative policy on murder in a non-gang-robbery scenario (as well as the legislative policy on the imposition of constructive liability on secondary offenders pursuant to s 34 generally). In our view, it is desirable that the legislative policy underlying s 34 be aligned with that underlying s 396 of the Penal Code. These two legislative policies have been misaligned ever since the putative Mimi Wong (CCA) test arose. Our restatement of the law on s 34 will align these two legislative policies.

[63] Against this backdrop, we have examined our own local authorities on the same issue and we must confess that we are not persuaded by the two Singapore Court of Appeal authorities cited before us.

[65] With respect, we are also not persuaded by the two Singapore Court of Appeal authorities cited and argued before us. Despite the lengthy explanation on the issue of common intention in particular in *Daniel Vijay*, we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted to the commission of a crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime.

[66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because common intention is essentially a state of mind. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.

[67] In *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425 ('Low

Kian Boon') in considering the scope of s 34 of the Penal Code, this court traced the origin of the said provision to the Indian Penal Code. This court in *Low Kian Boon* said that:

> It is not without significance that the original draft of the Indian Penal Code did not contain the phrase 'in furtherance of the common intention of all'. The words were inserted by s 1 of Act xxvii of 1870 (India). When the Indian Penal Code was introduced into the Straits Settlements in 1872 and the Federated and Unfederated Malay States, the section as amended was also received.
>
> Section 33 states that the word 'act' denotes a series of acts as well as a single act; and the word 'omission' denotes a series of omissions as well as a single omission. It follows that the words in s 34 'when a criminal act is done by several persons' may be construed to mean 'when criminal acts are done by several persons'. *Thus, where different acts in a criminal enterprise are committed by different participants, such participants may still beregarded as having done 'a criminal act' for the purposes of liability under s 34. The raison d'etre, as it were, of s 34 was to meet the situation where it may be difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operates to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the actus reus himself.* This was recognised by Lord Sumner in the Privy Council decision in *Barendra Kumar Ghosh v Emperor AIR* 1925 PC 1 at p 5:
>
> > The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it.

[68] The issue as to whether under s 34 of the Penal Code, there must exist a common intention to commit the crime actually committed as decided in the case of *Rex v Vincent Banka & Anor* [1936] 1 MLJ 53 was considered by this court in *Low Kian Boon*. This court in *Low Kian Boon* said:

> In *Vincent Banka*, the two appellants were charged with committing robbery and murder in the course of robbery. Evidence was inconclusive as to which of the two appellants had carried the knife or inflicted the fatal wound. They were convicted on both charges and appealed against their convictions for murder. The appeal was allowed, Huggard CJ said at p 69:
>
> > It follows that it is the duty of the trial judge, in cases where s 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

A And at p 70:

> ... under the terms of that section (ie s 34 of the Penal Code) as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'.

B

It was clear that the two appellants had set out to commit robbery. Regarding the murder, however, evidence was inconclusive as to who had carried the knife or inflicted the fatal wound. Applying the test enunciated by Huggard CJ, the court held that there must be evidence that there was a common intention between the C robbers not merely to commit robbery but also, if necessary, to kill the deceased. Since there was no evidence of any express agreement between the appellants that a knife should be carried or that the victim should be stabbed, the court convicted them only of robbery and acquitted them of murder.

D **[69]** To demonstrate the fallacy in the aforesaid reasoning in *Vincent Banka*, this court in *Low Kian Boon* referred to the judgment of Lord Summer in the leading authority of the Privy Council in *Barendra Kumar v Emperor* AIR 1925 PC 1:

E The fallacy in this kind of reasoning was demonstrated by Lord Sumner in *Barendra Kumar Ghosh v Emperor* , the leading Indian authority. The facts were that the appellant, together with a few others, had gone to a Post Office in Bengal to demand money from the sub-postmaster. All of them fired at the sub-postmaster with their pistols. He was hit in two places and died almost instantly. The appellant was arrested after the others fled. The trial judge directed the jury that the appellant F might be the man who fired the fatal shot and that if the jury were satisfied that the sub-postmaster had been killed in furtherance of the common intention of all, the appellant was guilty of murder whether he fired the fatal shot or not. The appellant was convicted of murder by the jury. Lord Sumner said at pp 5–6 and 9 of the report:

G

> The appellant's argument is, in brief, that in s 34, 'a criminal act', in so far as murder is concerned, means an act which takes life criminally within s 302, because the section concludes by saying 'is liable for that act in the same manner as if the act were done by himself alone', and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act H done by himself and fatal to his victim.
>
> Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, I and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common at all.
>
> It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself. Criminal action, which takes the form

> of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment.
>
> By the way of illustration it may be noted that, in effect, this means, that if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.
>
> This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough; there must be proved an act which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another, or the same as that other's act. The result is that s 34, construed thus, has no content and is useless ...

He then outlined a hypothetical situation to illustrate his point:

> Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under s 34. Really it is not.
>
> Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, is done by himself alone, is precisely not the act done by the other person.
>
> There are two acts, for which both actors ought to suffer death, separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal; so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does: it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of s 34. .
>
> On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged its onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man.

And ended by saying:

> If s 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether.
>
> If the appellant's argument were to be adopted, the Code, during its early years, before the words 'in furtherance of the common intention of all' were added to s 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words express all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there ...
>
> *Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amending section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section*.
>
> *Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, 'a criminal act' means that unity of criminal behavior, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence*. (Emphasis added.)

[70] Simply put, common intention is concerned with the principle of joint liability in penal law. This principle has been set out in numerous judgments in our jurisdiction. In *Krishna Rao*, the appellants were charged for the murder of four persons in the course of robbery of a jewelery shop. In the High Court, Kang Hwee Gee J (as he then was) in in convicting the appellants quoted the law on common intention expressed by the Singapore Court of Appeal in the case of *Shaiful Edham bin Adam & Anor v Public Prosecutor* [1999] 2 SLR 57 in the following words:

> 1. ...
>
> 2. all that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed;

3. the rider to this proposition was that the participants must have had some knowledge that an act may be committed which would be consistent with or in furtherance of, the common intention;

[71] The decision of the High Court was affirmed by the Court of Appeal and the Federal Court. The Federal Court approved the trial judge's application of the legal principle relating to s 4 of the Penal Code (see [2009] 3 MLJ 643). The Federal Court held that having regard to all the circumstances of the case, the theft or burglary or robbery and the murders were an integral part of one and the same transaction. Put differently, the Federal Court held that this was not a case of a mere recovery of recently stolen property from an accused person. There were several other cogent pieces of circumstantial evidence which go to establish beyond a reasonable doubt that the first and second appellants in that case participated in the commission of the murders in the context of s 302 being read with s 34 of the Penal Code.

[72] In another case of *Public Prosecutor v Teong Lung Chiong & Ors* [2010] 5 MLJ 193, the respondents were convicted by the High Court of the murder of the deceased who was raped prior to her death. The respondents were acquitted by the Court of Appeal. On appeal to the Federal Court, the deputy public prosecutor categorised the issue on common intention as 'there was a common intention on both the respondents to rape and murder the deceased, Hew Leh Poh and went on to submit that:

> Upon a finding of facts that there was a common intention to rape Hew Leh Poh and in furtherance of that common intention the young girl was murdered in order to prevent her from reporting on them (the respondents), the Court of Appeal clearly erred in not directing its intention to the application of section 34 to uphold the conviction of murder imposed on the respondents.

[73] The Federal Court agreed with the deputy's submission and restored the respondents' convictions for murder. The pertinent issue before the Federal Court was who then amongst the respondents who actually killed the deceased? The Federal Court in addressing this issue held that based on the cumulative effect of the respective cautioned statements of the respondents, even when considered separately and independently in relation to the issue of common intention, and the other evidence adduced, circumstantial or otherwise, the responsibility should rest solely on all the respondents. In this regard, the Federal Court held that the trial judge was therefore correct when he said in his judgment that although the respondents in their cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents.

[74] The Federal Court further held that the Court of Appeal was wrong in looking for a direct link to who actually amongst the respondents who committed the act or acts in killing the deceased. The Court of Appeal's approach according to the Federal Court was not quite in tandem with settled law that is when s 34 of the Code is invoked, there is no requirement for the prosecution to prove who exactly ultimately caused the deceased's death. The Singapore case of *Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688 was cited with approval.

[75] From the above cases, we are of the view that the law on the operation of s 34 of the Penal Code is well settled. We have no reason to depart from this established principles on common intention. As stated earlier, the existence of a common intention is a question of fact of each of the case to be proved as a matter of inference from the circumstances of the case.

[76] Reverting back to the specifics in the present case, the question is whether there was participation by the accused persons which culminated in criminal acts that resulted in the death of the deceased. Having considered the material in the record provided to us, we are satisfied that having regard to all the circumstances of the case, the theft or burglary or robbery — call it what you will — and the murder of the deceased were an integral part of one and the same transaction. Put differently, there are several cogent pieces of circumstantial evidence which go to establish beyond a reasonable doubt that the accused persons participated in the commission of the murder in the context of s 302 being read with s 34 of the Penal Code.

[77] From the evidence, we have no hesitation in categorising the first accused as the master planner of the whole crime. He hatched the plan to injure the deceased and went around scouting for others to carry out his plan. Undoubtedly, without his role of identifying the deceased to the other accused and without his payment no one would agree to his bid. He may not be at the scene of the crime or has not lifted a finger in the killing of the deceased but his exhortation and motivation for the commission of the crime must be seen to be part of the chain that led to the murder of the deceased. In short the first accused played a major role in planning the whole act. He was 'the main character who brought all the puppets together and masterfully choreographed the crime committed against the deceased'.

[78] The first accused's disappearance just minutes before the deceased was seen coming out of the pub was no coincidence. So was his reappearance (under the Bintawa Bridge) immediately after the commission of the crime. Surely the payment of RM1,600 to the other accused was an inducement and

a motivation by him. It may be a paltry sum but enough to induce the commission of the crime. It was paid by the first accused soon after the crime was completed and without even bothering to find out what had happened to the deceased which gave rise to a further inference that he knew what had become of the deceased.

[79] Participation by the first accused may be overt or covert and participation in our view need not in all cases be by physical presence. In this respect, we adopt what was said by Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal in *Sabarudin bin Non*. In that case, one of the issues raised was that the fourth and fifth accused were neither present at the scene of abduction nor were they at the place where the deceased was done unto death, nor were they at the scene where her body was cast into the ravine; thus s 34 had no application to the fourth and fifth accused. Gopal Sri Ram JCA addressed the issue in the following manner:

> In our judgment, presence in every case is not necessary for section 34 to apply. In our judgment, section 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for section 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v State of Uttar Pradesh, where his lordship said:*
>
> > Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions form a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s 34 cannot apply in the case of those two persons indicted in the illustration.
> >
> > Thus to attract s 34 IPC two postulates are indispensable: (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person;(2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
> >
> > Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of s 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is

enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the coaccused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s 32 IPC. So the act mentioned in s 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape form the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim.

[80] In the recent case of *Manikumar Sinappan & Ors v Public Prosecutor*, the Federal Court found that participation and common intention were established against the first accused despite his absence from the scene at the time the crime was committed. It was held that what was important was that the first accused's conduct had nexus, and was intricately interwoven, with the conduct of the other accused in the criminal enterprise during the relevant period of the crime so as to attract liability under s 34 of the Penal Code.

[81] In the present case, the role played by the second accused was no less significant. He recruited the third and the fourth accused and took them around to meet the first accused in his car each time the first accused came over to discuss their plan. He happened to be the only English speaking person among the other accused acting as the 'go between'. It was the second accused who pointed the deceased to the third and fourth accused and asking them to go after the deceased, the moment the deceased was seen leaving the pub on that fateful night. While the third and fourth accused were pursuing the deceased, the second accused and PW1 waited at their motorcycles. Soon after, the second accused called the first accused and they met under the Bintawa Bridge where he was given RM1,600 by the first accused which the second accused then distributed it equally with the third and fourth accused and PW1. Clearly the evidence suggested that the second accused facilitated the commission of the offence. The second accused absence like the first accused from the actual scene of the crime is in our view of little or no significance.

[82] As to the third and fourth accused, we can justifiably conclude that both were armed with knives which according to PW1 was about eight inches long. This fact fairly supports an inference of complicity between the third and fourth accused. The fact that both of them were pre-armed with knives left no doubt that the assault on the deceased was a premediated one. Likewise, the multiple stab wounds inflicted on the unarmed and defenceless victim showed

that the assault was nothing short of being cruel. On these two scores, the defence of violent fight or struggle was clearly not available to the third and fourth accused. It was highly unlikely that the deceased had behaved in a provocative manner as suggested by the third and fourth accused.

[83] Without a doubt the third and fourth accused were the actual perpetrators of the crime. It is inconceivable that the deceased was fighting with them with a knife in one hand and her handbag in the other. Even more perplexing is the fact that both the third and fourth accused had a knife each with them when they gathered under the Bintawa Bridge. Was the deceased carrying two knives with her, since both the third and fourth accused said they were unarmed?

[84] In our judgment there is more than sufficient evidence that points to the culpability of the third and fourth accused. A woman's scream was heard very soon after the two followed the deceased. About five to six minutes later the two were seen with a bloodstained trousers and a bloodstained knife. In addition there was a lady's handbag which was later confirmed to belong to the deceased. There was in our view, overwhelming circumstantial evidence that the third and the fourth accused caused the injuries to the deceased which led to her death. The paraphernalia which accompanied the third and the fourth accused persons left no room for any doubt that there was common intention to use the knives they had brought along to overcome any resistance they might encounter.

[85] The next question is whether the criminal acts committed were 'in furtherance of common intention'. We have scrutinised and reevaluated the whole evidence very carefully and based on the settled principles of law on common intention which we have averted to, we find that there is more than sufficient evidence to infer common intention among the accused persons. Upon our review and reevaluation of the totality of the evidence, we are convinced that the decision of the trial judge in convicting the accused persons on the charge of murder under s 302 of the Penal Code read with s 34 of the Penal Code was not wrong. We consider the entire transaction, from the identification of the deceased's identity and location on the day of the incident to the actual infliction of fatal injury on the deceased's person, as the criminal acts in question, being the 'unity of criminal behavior' which resulted in the offence of murder.

[86] We are convinced that all the accused to the criminal enterprise share the intention to commit the criminal acts eventually perpetrated against the

deceased even though only the third and fourth accused had physically perpetuated the offence itself. In the present case, there was advance planning, entailing even a prior visit to and survey of the scene for familiarisation. On the fateful day the victim was confronted in a situation where there were no bystanders. The events which occurred after the robbery created an indelible link between the accused persons. The events which unfolded after the incident clearly depicted that the accused persons knew that the deceased had been killed. It is without any doubt that the deceased was subjected to callous abuse and brutish violence before she met her death.

[87] The evidence of the first accused's previous attempt to hire persons to cause injury to the deceased is a relevant fact under s 8 of the Evidence Act 1950, and is of particular significance. In this respect, corroborating evidence was offered by four independent witnesses. The witnesses were: PW2 and PW9, two of the deceased's close friends to whom the deceased told of the attempt one week prior to her death; as well as PW10 and PW13, two persons commissioned by the first accused to injure the deceased. The deceased herself had lodged a police report soon after the attempt.

[88] The parallels between the previous attempt and the present case are striking. In both instances, the first accused hired a number of persons to injure the deceased. Similar to the present incident, there was evidence that the first accused previously:

(a) went to meet PW10 and PW13 to engage them in the plan;

(b) showed photos of the deceased on his hand phone to them;

(c) brought them to the locations frequented by the deceased;

(d) gave them a first payment of RM200;

(e) instructed them to follow the deceased; and

(f) upon being told that the deed was done, gave them a second payment of RM1,600.

[89] The main difference was that in the previous attempts, PW10 and PW13 did not carry out the first accused's plan. PW13 persuaded the deceased to let him take her car to the first accused in order to convince him that the plan had been executed and the deceased followed in another car driven by PW10 to the agreed destination, where PW13 met the first accused and received the money.

[90] The similarities between the two instances demonstrate an elaborate modus operandi adopted by the first accused. The first accused's conduct was entirely inconsistent with his testimony that he merely intended to frighten the

deceased so that she refrained from going out at night, motivated by a concern for the deceased's safety. Doubtless, the aim of frightening the deceased would have been achieved after the previous attempt; the evidence of PW2 and PW9, as well as the lodging of a police report, indicate that the deceased was left feeling very scared. However, dissatisfied with the previous attempt, the first accused proceeded to commence another attempt to 'hurt' the deceased. The extent of his methodical preparations, and the hiring of persons to injure the deceased again only one week after the previous attempt to do so, strongly indicate a determination on the first accused's part to inflict upon the deceased not just facial injury. Moreover, the first accused's own evidence reveals that he did not care to know who was going to execute the plan, or to consider other injuries that may be inflicted upon the deceased, reflects his callous disregard for the deceased's safety.

[91] Additionally, we observe that while the deceased was represented to be first accused's girlfriend at the material time, it was PW9's unchallenged evidence that the deceased was in fact first accused ex-girlfriend and former business partner, whom he had physically abused, and that the first accused had been living together with another girlfriend at the time of the incident. In this connection, PW9's testimony further discredits the first accused's alleged worry for the deceased's safety.

[92] One important aspect of the previous attempt was the plan to take the deceased's property, thereby giving the impression of a robbery. The evidence of PW9, PW10, and PW13 show that the first accused wanted those he hired to bring her car and handbag to him as proof that the job was done. Consistently, PW2 testified that the deceased told her that the first accused instructed those hired to drive her car away along with her handbag to make the murder and disfigurement look like a robbery. Even though PW10 and PW13 did not execute the plan, they did bring the deceased's car to the first accused as instructed so as to satisfy him that the job had been done.

[93] The fact that the third and fourth accused took the deceased's handbag away after their encounter with her, cannot be a mere coincidence. We find it hard to accept the fourth accused account that upon approaching the deceased, he suddenly changed his mind about injuring her but decided to rob her of her handbag instead. It appears to us that the taking of the deceased's handbag in the course of fatally injuring her to give the appearance of a robbery was part of the common intention of the accused persons.

[94] Prior to the encounter with the deceased, the accused (or some of them) met on several occasions. After the initial meeting between the first accused and PW1 at Kampung Gersik, there were at least four meetings between the accused persons, during which:

(a) PW1 introduced the first accused to the second accused at Semariang. The first accused showed PW1 and the second accused a photo of the deceased on his hand phone; and the first accused brought the second accused and PW1 to the deceased's house in Batu Kawa;

(b) the first, second and the fourth accused, and PW1 met at Kampung Gersik. The first accused brought them to a pub in Ang Cheng Ho where the first accused pointed out the deceased to second accused; and

(c) on first accused instructions, the second, third, fourth accused and PW1 went to Ang Cheng Ho and then to Batu 3 behind Siang Siang Corner. The first appellant arrived at Batu 3 and was joined by second accused in his car for a brief discussion.

[95] After the third and the fourth accused encounter with the deceased, the fact that the second accused and PW1 were ready with motorcycles to drive the third accused and the fourth accused away from the scene to Bintawa Bridge, where the first accused timely came to meet and pay them, further indicates the degree of pre-planning involved. Again, the extent of the preparatory effort belies an intention simply to scratch the deceased's face, in order to frighten her with a trivial injury. On the contrary, the number of persons involved and the multiple meetings beforehand suggest a more elaborate plan to cause more severe consequences. Taken together with the fact that this endeavor followed a previous attempt which was planned in similar detail, the series of events leading up to the deceased's death reinforce the inference that the accused persons shared a common design, meticulously arranged, culminating in the death of the deceased.

[96] We are of the view that on the totality of the evidence, the common intention to kill the deceased was formed just before the third accused and the fourth accused went after the deceased on that fateful morning of 9 August 2007. Irrespective of the events prior to that, the evidence of PW1 relating to that point in time admits of no other inference. This is especially so considering the fact that minutes after the third and fourth accused returned, the deceased was found dead at the place where she was attacked by the third and fourth accused. The first and second accused both saw the deceased coming out of the pub just before the third and fourth accused went after her and attacked her after the second accused had pointed her out to the third and fourth accused.

[97] The post-mortem report ('P4') by PW3 revealed no less than nine sharp force wounds on the deceased. Four of the stab wounds were inflicted upon vulnerable parts of the deceased's body, namely on the neck, the chest, and below the left ribcage. The deepest of the stab wounds was 9cm. The stab wound to the neck, which severed the internal jugular vein, was determined as the cause of death. The deceased also sustained multiple abrasions on her limbs.

The injuries on her arms were consistent with defensive wounds, indicating an effort by the deceased to ward off attacks.

[98] The nature of the injuries, taking into account their locations and extent, are wholly inconsistent with the contention of private defence by the third and the fourth accused. The portrayal of the third and fourth accused as victims, and the deceased as the aggressor who attacked the former ferociously using a knife and her handbag, defies belief. This is amplified by the fact that the only injury sustained by the two of them was a cut to the fourth accused's left thumb. The injuries found on the deceased's body could not have been purely accidental. On the contrary, they can only give rise to the conclusion that the intention of the perpetrators was to cause the death of the deceased.

[99] That the third and the fourth accused indeed took the deceased's handbag away after their encounter with her cannot be a mere coincidence. We find it hard to accept the fourth accused's account that upon approaching the deceased, he suddenly changed his mind about injuring her and also happened to decide to rob her of her handbag instead. It appears to us that the taking of the deceased's handbag in the course of fatally injuring her, to give the appearance of a robbery, was part of the common intention of the accused persons.

[100] After the encounter with the deceased, the accused persons acted without any regard to the risk of being identified by the deceased and of being arrested. Such a risk would have struck them as real and imminent if they had no knowledge of the deceased's death, especially since the first accused was known well to the deceased, and that the third and the fourth accused would have been seen by the deceased. However, in contrast with their otherwise elaborate planning, the accused persons did not discuss the fate of the deceased or their next course of action should the deceased report them to the police after the event. Instead, the accused persons divided the contents of the deceased's handbag under the Bintawa Bridge and threw away the items deemed unnecessary. It is important to note that the deceased's hand phone was found on third accused bed on his arrest. Despite his alleged concern for the deceased's safety, the first accused did not check whether the deceased was safe after the incident, and testified that he only knew of the deceased's death ten days later from a newspaper given by his office staff.

[101] The conduct of the accused persons as aforesaid would appear to be inexplicable, unless they knew what had become of the deceased. Considered in light of all the circumstances, including the nature of the injuries inflicted and the degree of pre-planning to hurt the deceased, the accused persons' conduct lead us to the irresistible inference that they must have common intention to cause fatal injury or death to the deceased.

[102] In our judgment, the intention to cause fatal injury or death to the deceased was commonly held by all the accused pursuant to their pre-planning. The common design of the accused persons which had originated from the first accused, was then communicated by the second accused as the English-speaking intermediary liaising between the first accused and the remaining accused persons, and was finally executed by the third and the fourth accused as planned.

[103] We will now deal specifically with the other issues raised on behalf of the accused persons.

Whether there was miscarriage of justice

[104] There is no dispute that, the trial judge regretfully did not determine the nature of the common intention among the accused persons with sufficient clarity. This according to learned counsel, resulted in a misdirection occasioning a miscarriage of justice. However, the Court of Appeal had addressed the issue by resorting to s 60 of the Courts of Judicature Act 1964 and guidance from the decision of the Federal Court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617 where it was held:

> We hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist. Here the Court of Appeal equally failed to do that. An appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to critical re-examination (*Ahmad Najib bin Airs v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289).

[105] In the instant appeal, the Court of Appeal did carry out an evaluation exercise to determine whether common intention existed among the accused persons. The Court of Appeal found that there was 'a unity of purpose and there was a meeting of minds between the four accused as to what was to be done and which was carried out by the third and the fourth accused'.

[106] We on our part, as seen from the preceding paragraphs in this judgment, have also undertaken the same evaluation and found that the evidence in this case taken as whole leads us to an irresistible inference that the accused persons must have commonly intended to cause fatal injury or death to the deceased. Thus, we find no merit on this issue raised on behalf of the accused persons.

Whether PW1 was an accomplice?

[107] Counsel for the four accused argued separately that the trial judge and the Court of Appeal had erred in accepting the uncorroborated evidence of PW1, who was an accomplice. The fact that PW1 was an accomplice was conceded by the learned deputy in the High Court. However, PW1's role was described as minimal.

[108] As a starting point, s 133 of the Evidence Act 1950 provides that an accomplice is a competent witness against an accused person, and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) of s 114 of the same Act provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In respect of the nature and extent of the corroboration, Raja Azlan Shah CJM (as His Majesty then was) in *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (at p 146) formulated the rules as follows:

> (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;
>
> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particulars the testimony of the accomplice; and
>
> (3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

[109] There is no doubt that PW1 was an accomplice. However, we find sufficient independent confirmation of the material particulars of PW1's testimony tending to connect all the accused to the offence. In respect of the first accused's involvement, PW1's account of the first accused's plan to hire several persons to cause injury to the deceased is supported by the evidence of PW2, PW9, PW10 and PW13, which show that the first accused had, shortly prior to the crime, made a first attempt to do so using the same modus operandi.

[110] It is trite that the evidence of an accessory must be corroborated irrespective of the degree of his participation in the transaction as a whole. Here, PW1's evidence was amply corroborated by independent circumstances. Those circumstances are as follows:

(a) under the Bintawa Bridge PW1 saw the third accused and the fourth accused holding a knife with a blood stain on it. This had led to the DNA analysis which revealed that the DNA profiles developed from the blood stains on the small broken knife blade ('P13(1)') found under

Bintawa Bridge belong to the deceased. The deceased cause of death was classified as 'neck injury due to stab wound';

(b) according to PW1, after the plan had been executed, all the accused persons and him went to Bintawa Bridge. The first accused came thereafter and paid them the total amount of RM1,600;

(c) the evidence as to the second accused's involvement in the crime is corroborated by the chemist's finding of his DNA on the Tsing Tao beer bottle retrieved from the scene of the crime (exhs P9, P25(1)), and his information to PW17 which led to the arrests of the third and the fourth accused at their residence;

(d) the information provided by the third accused to PW17 under s 27 of the Evidence Act led to the discovery of the deceased's personal belonging in the bush near the Bintawa Bridge. This piece of evidence confirmed PW1's testimony that the third and the fourth accused attacked the deceased in order to carry out the instructions given by the first accused which was relayed through the second accused. The discovery of the articles belonging to the deceased also confirms PW1's evidence about the meeting which took place under Bintawa Bridge after the third and the fourth accused had executed the plan; and

(e) PW1's evidence as to the third accused's involvement is corroborated by PW17's evidence that the third accused led to the discovery of a purse and a pen drive under the Bintawa Bridge, both of which were identified as belonging to the deceased (exhs P45(1) and P46(1)). The deceased's hand phone was seized from the third accused's bed upon his arrest (exh P44(1)).

[111] In light of the evidence highlighted above, we find that PW1's evidence was corroborated in material particulars and properly taken into account by the trial judge. We further took note of the trial judge's concern about the evidence of PW1 whom he had treated correctly as an accomplice. The trial judge was sure of the nature of his evidence and had treated it with caution and had also found corroboration. We agree with the trial judge.

Two sets of conflicting evidence

[112] The next issue is whether the prosecution had proffered two conflicting sets of evidence. It was contended by counsel for the first as well as counsel for the second accused that the prosecution had offered two sets of conflicting evidence on the issue of intention: whilst on the one hand, PW2 gave evidence that the first accused threatened to kill the deceased by asking three to four persons to cut off her hands and legs and disfigure her face, then drive off with her car and her handbag to make it appear to be a robbery; on the other, PW1

testified that first accused's instruction was to cause injury to the deceased's face. The effect thereof, it was argued, was that the court was left with no reliable evidence upon which to base the convictions of the accused persons, and that they must be given the benefit of the doubt.

[113] With respect, we find that the allegation of material contradiction between the two witnesses' evidence is misconceived. We find no material contradictions between the accounts of PW2, PW9, PW10 and PW13. The dissimilarities in the evidence being matters of detail, we find no error in the treatment of the evidence by the courts below. It is clear from the record that the trial judge had directed himself on both the issue of credibility and accuracy of the witnesses evidences and took into account the discrepancies which lay at the forefront of the attack by the accused persons. We have no reasons to disagree.

The admissibility of the chemist report ('P9') and statement made under s 27 of the Evidence Act 1950

[114] Another issue raised by counsel for the second accused is the issue concerning the reliability of the chemist's report ('P9') produced by PW7. Two grounds were raised. First, PW7 admitted to the involvement of her subordinates in carrying out the DNA analysis, thus tainting the analysis with alleged non-compliance with 'strict international procedure/protocol'. However we find that no international procedure or protocol was cited to us in support. Additionally, the interpretation of the results of the DNA analysis was conducted by PW7 alone.

[115] Secondly, it was argued that the report in P9 made no mention on the population database against which the DNA profile matching was calculated, or the probability of a randomly selected individual having a matching DNA profile. However we find that this issue was never raised in cross-examination in order for PW7 to be afforded an opportunity to explain.

[116] Counsel for the second accused also contended that exhs P56 and P57 ought not to have been admitted under s 27 of the Evidence Act, as information leading to the discovery of a fact. P56 is a handwritten note by PW17, the investigation officer, of the statements allegedly made by first accused while in a police van. P57 is a police report lodged by PW17 in respect of the same. The statements implicated the third and the fourth accused in the crime and led to their arrests. Objections by counsel against the admission of such evidence in the cross-examination of PW17 were overruled by the trial judge; however, in the grounds of judgment no reasons were given, and no reference was made to the two exhibits.

[117] We consider the admissibility of the two exhibits to be no longer a material issue at this stage. The second accused himself has admitted to making the statements in his examination-in-chief and did not challenge their contents as untrue (see RA Vol 2a, p 263). The involvement of the second, third and the fourth accused is not in dispute. In any event, we agree with the Court of Appeal's view that the admission of the exhibits was not fatal to the case, and that the exhibits did not constitute evidence so material that they cannot be ignored. In light of the totality of all the other evidence against the appellants, we find no merit in this ground of appeal.

Section 300(c) of the Penal Code

[118] Counsel for the first and the second accused also argued that the prosecution had not established that the injuries inflicted were sufficient in the ordinary course of nature to cause death for the purpose of murder under s 300(c) of the Penal Code. It was contended that the evidence of PW3, the forensic pathologist who performed the post-mortem, was inconclusive and at best only supported a finding that the injury was likely to cause death, thus ought to be categorised as culpable homicide under s 299. In particular, it was pointed out that when asked in cross-examination whether the injuries on the deceased were sufficient in the ordinary course of nature to cause death to the deceased, PW3 did not understand the question. Instead, the stab wound to the deceased's neck was described as 'potentially fatal'.

[119] It was brought to our attention that PW3 has not previously testified in court. While previous rectification in court as an expert witness is no doubt an added consideration, it is not necessarily the primary consideration for an otherwise qualified person (*Dato' Mokhtar Hashim)*. In this regard, we note that PW3's qualification was conceded by all parties.

[120] Upon recall, PW3 explained that 'potentially fatal' meant that the stab wound to the neck is highly likely have caused death due to excessive bleeding. In this particular instance, PW3 was unable to quantify the volume of blood lost. Nevertheless, PW3 testified that 'any injury to a major blood vessel, if it is not treated would eventually lead to death due to excessive blood loss'. PW3 further confirmed that besides the neck injury, there was no other injury severe enough to cause death. We consider that PW3's evidence to have established that the neck injury, being an injury to the internal jugular vein, was sufficient in the ordinary cause of nature to cause death by excessive bleeding. We find that the elements of s 300(c) have been satisfied.

CONSIDERATION OF THE DEFENCE

[121] The final point raised in this appeal is whether the trial judge had sufficiently considered the defences raised by the accused persons. In addressing this issue we find that the trial judge and the Court of Appeal had carefully considered the defences raised by the all accused and in rightfully rejecting them as 'most preposterous' and an insult to one's intelligence. Further, we agree with the Court of Appeal's findings that the accounts of events given by the third and fourth accused as 'mere concoctions to save their own skin'. We find that the trial judge did not err when he rejected the explanations advanced by the accused persons as 'unbelievable because they defy common sense and are discordant with the common course of human affairs'.

[122] In our judgment, the defences of the accused persons were never raised prior to their defence being called, either in the course of police investigations or at the prosecution's case. The first accused's statement to the police upon arrest (exh D1) was a bare denial of any involvement in the crime: 'I am not involve with this murder case.' At the prosecution's case, the initial stand taken by all four accused was a wholesale denial of the evidence implicating them, and an attack on the credibility on the prosecution witnesses. In particular, the third and fourth accused reliance on sudden fight or private defence and their account of the injuries being inflicted upon the deceased in their struggle to defend themselves was not put to PW3, the forensic expert, or PW17, the investigation officer.

[123] It is trite that as an appellate court our task is to review and consider the decision of the courts below. We need to determine whether on the evidence adduced the defence was rightly called. If so, whether the defence can be believed or had at least raised a reasonable doubt in the prosecution's case. Having therefore analysed and considered the defence and the evidence adduced as a whole in this case we find that the defence cannot be believed and also had not cast a reasonable doubt against the prosecution's case. We find that the prosecution had proved its case beyond reasonable doubt

CONCLUSION

[124] Upon careful scrutiny of the records, the evidences and the judgment under appeal we find that the convictions recorded against the accused persons are safe.

[125] The appeals are dismissed. We affirm the convictions and sentences of all four accused for murder under s 302 of the Penal Code read with s 34 of the same.

Appeals dismissed; convictions and sentences affirmed.

Reported by Afiq Mohamad